

National Environmental Policy Act Update 2018

Emergency Response to Forest Fires Authorizes Agency to Forego a NEPA Review

The Forest Service was exempt from NEPA when it was responding to an individual wildfire while it was occurring. *Forest Service Employees for Environmental Ethics v. United States Forest Service*, No. 17-35569, 726 Fed. Appx. 605, 2018 WL 2752485 (9th Cir. June 8, 2018) (not for publication).

Background: Plaintiffs alleged that the Forest Service violated NEPA by not preparing an environmental impact statement (EIS) or an environmental assessment (EA) prior to constructing a community protection line (CPL) during the Wolverine wildfire of 2015 in the Okanogan-Wenatchee National Forest in Washington. The CPL consisted of a 300-foot wide swath of land thinned of vegetation by logging significant amounts of timber. The CPL stretched for many miles and was constructed to act as a barrier between the Wolverine fire and populated communities. The Forest Service argued that it relied on an emergency regulation that authorized the agency to forego an EIS or EA prior to constructing the CPL. Plaintiffs countered by claiming that forest fires are not emergencies exempt from NEPA by citing the dictionary definition of “emergency” as an unforeseen event. Plaintiffs argued that because forest fires are a common occurrence in the Western United States, they are not unforeseen.

The Court’s Analysis: The court stated that while fires happen every year, “it defies plain language and common sense to conclude that no individual fire – or its course, intensity, or duration – could be unforeseeable. It is unreasonable to argue that forest fires can never present emergency situations when viewed at the time the fire is raging.” *Id.* at 606. The court found that the plaintiffs provided no evidence that the Wolverine fire was not an emergency. Therefore, the court held that the Forest Service did not act arbitrarily or capriciously in invoking its emergency rule during the Wolverine fire.

Construction of a Pipeline Was Not Federalized

Construction of an intrastate pipeline that did not require federal approval was not subject to NEPA. *Big Bend Conservation Alliance v. FERC*, No. 17-1002, 896 F.3d 418 (D.C. Cir. July 17, 2018).

Background: Trans-Pecos Pipeline, LLC, sought authorization under Section 3 of the Natural Gas Act to construct and operate an export facility consisting of a 1,093-foot pipeline running from a meter station in Texas to the international border. Concurrently, Trans-Pecos undertook to construct and operate a 148-mile intrastate pipeline that would transport natural gas produced in Texas to the export facility. The pipeline would connect with other intrastate pipelines and may in the future connect to interstate pipelines. The Federal Energy Regulatory Commission (FERC) concluded that there was insufficient federal control over the intrastate pipeline to warrant a NEPA review. It did issue an EA addressing impacts of the export facility. Plaintiff petitioned for review of the authorization of the facility to export natural gas from the United States to Mexico. Plaintiff argued that an expanded environmental review was required to include the intrastate pipeline delivering the gas to the border, in addition to the export facility at the border. Specifically, plaintiff argued that the projects were impermissibly segmented, and the pipeline should have been federalized for NEPA purposes.

The Court’s Analysis: The court disagreed with the plaintiff. It determined that the pipeline would only transport gas produced in Texas and received from other Texas intrastate pipelines or Texas processing plants and would be located entirely within Texas. The court stated that the connected-actions doctrine did not require aggregation of federal and non-federal actions. Specifically, the need for federal approvals to construct discrete segments of an oil pipeline did not subject the entire pipeline to NEPA review. The key point, the court said, was that the bulk of

the pipeline was not subject to federal jurisdiction. Here, the export facility was subject to FERC's jurisdiction, but the intrastate pipeline was not. Because, no federal action was required to authorize the pipeline's construction, there was no connected federal action and so the connected-actions regulations did not apply. Plaintiff argued that FERC should have asked whether the pipeline would have been constructed *but for* the agency's approval of the export facility. However, the court rejected this but-for test as one that would improperly allow FERC to extend its jurisdiction over non-jurisdictional activities simply on the basis that they were connected to a jurisdictional pipeline. The court determined that the plaintiff's argument depended on a test that both FERC and this court had rejected in past decisions. The court denied plaintiff's petition for review.

Pipeline Project Was Not Impermissibly Segmented

The court reviewed whether FERC impermissibly segmented its NEPA review by failing to consider three planned projects together in a single EIS. *City of Boston Delegation v. FERC*, No. 16-1081, 897 F.3d 241 (D.C. Cir. July 27, 2018).

Background: FERC approved an application from Algonquin Gas Transmission, LLC, to upgrade its natural gas pipeline system (AIM project). It sought to replace 29.2 miles of existing pipeline with larger diameter pipe, construct 8.2 miles of new pipeline, build three new meter stations, and modify various other compressor and meter stations. Part of the pipeline replacement was next to a nuclear facility. In addition to this upgrade, Algonquin was also pursuing two other upgrades to its northeast pipeline system (the Atlantic Bridge and Access Northeast projects). Plaintiff sought review of FERC's approval. The plaintiff claimed that FERC impermissibly segmented its planned projects by failing to consider Algonquin's three planned projects together in a single EIS. Plaintiff also claimed that FERC failed to consider the cumulative impacts of the three upgrade projects.

The Court's Analysis: The court first addressed the segmentation argument by following a set of factors that the court developed to help clarify when physically connected projects can be analyzed separately under NEPA (when an agency considers projects non-contemporaneously and when projects have substantial independent utility, separate environmental statements can be appropriate). The court cited to three cases for guidance. In *Delaware Riverkeeper*¹, the court found that FERC impermissibly segmented its review of four pipeline upgrades because it determined they were connected and interrelated, functionally and financially interdependent, had significant temporal overlap, and were either under construction or pending before FERC for an environmental review and approval at the same time. In contrast, in *Minisink*² and *Myersville*³, the court found that FERC could conduct separate environmental assessments. The projects in these cases either lacked a temporal overlap because the application for the later-in-time project had yet to be submitted when the main project was under consideration or the projects were unrelated and did not depend on one another for their justification. Here, Algonquin had yet to file its application for the other two upgrades, and the projects were not under simultaneous consideration by FERC. Algonquin's three projects also had separate open seasons, had executed individual precedent agreements with distinct shippers, different negotiated and recourse rates and separate in-service dates, and did not depend on the other projects for access to the natural gas market. Thus, the court concluded that these projects were more aligned with *Minisink* and *Myersville* rather than *Delaware Riverkeeper*. Thus, based on the functional and temporal distinctness of the three projects, the court found that it was permissible for FERC to prepare a separate EIS for the AIM project.

Next, the court looked at whether FERC gave sufficient consideration to the cumulative environmental impacts. Here, the impacts of the Atlantic Bridge project were reasonably foreseeable, and the court determined that FERC

¹ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014).

² *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014).

³ *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015).

thoroughly considered the environmental effects of this project in the cumulative impact section. The Access Northeast project was more limited since it was months away from entering the pre-filing process and over a year away from issuance of a notice of intent to prepare an EIS. Given the preliminary stage and the resulting lack of available information about the scope at the time, the court determined that the project was too preliminary to meaningfully estimate its cumulative impacts. Thus, the court found that FERC adequately considered the cumulative impacts of the other two projects based on the information then available to the agency.

Plaintiff also challenged FERC's determination that the AIM project posed no increased threat to the Indian Point nuclear power plant. Here, FERC relied on the safety evaluation performed by the operator of Indian Point that determined that the project would pose no additional safety risks to its facility. In addition, FERC relied on the independent analysis performed by the Nuclear Regulatory Commission (NRC) that reached the same conclusion. The court deferred to FERC and stated that it was permissible for FERC to accept the expert conclusion of that of another federal agency that was more directly responsible and more competent in assessing external threats to the nuclear facilities it regulates.

In conclusion, the court dismissed the plaintiffs petition for review.

Agency Did Not Improperly Treat Multiple Highway Projects As Separate Projects

The Fifth Circuit reviewed a specific question of whether multiple highway projects are in effect, a single course of action. *Fath v. Tex. DOT*, No. 17-50683, 2018 WL 3433800 (5th Cir. July 17, 2018).

Background: The Texas Department of Transportation (TxDot) proposed several new highways to alleviate traffic in Austin. It proposed to build an overpass where Texas State Highway Loop 1 (known as "MoPac") intersects with two existing streets it would pass under; extending State Highway 45 West by about four miles, with a tolled freeway; and had plans to add express lanes on eight miles of MoPac. For the overpass project, TxDot prepared an EA. The State Highway 45 project was reviewed under state law because no federal aid was being received. The express lanes on MoPac was still in the initial phase of review. Plaintiffs argued that all three highway projects were improperly segmented and should have been considered together.

The Court's Analysis: First, plaintiffs contended that TxDot needed to comply with CEQ's regulations that state that agencies must treat multiple projects as a single course of action if they are connected, cumulative, or similar actions. However, the court stated that CEQ's regulations (40 CFR 1508.25(a) and 1502.4(a)) only provide general guidance and more detailed regulations are provided by individual agency regulations. For highway cases, the Federal Highway Administration's (FHWA) regulations control when deciding if agencies improperly treated multiple highway projects as separate projects under NEPA. Here, TxDot treated MoPac as a standalone project since it had a logical termini. The court agreed that this complied with FHWA's regulations (23 CFR 771.111(f)) that allowed an agency to treat a highway as a standalone project for NEPA purposes if it had a logical termini. Here, the MoPac intersected with two streets and it was hard for the court to imagine what other termini would be logical, especially since FHWA contemplated crossroads as a logical termini in issuing section 771.111(f). Next, plaintiffs argued that TxDot violated NEPA because the overpass project's EA contained no analysis of the project's cumulative impact. The court disagreed. A full analysis is unnecessary where, as here, the project would not have any significant environmental impact that can accumulate with the impacts of other actions. Under the rule of reason, an agency is relieved from preparing exhaustive reports that would serve no purpose in light of NEPA's regulatory scheme as a whole. The court affirmed the district court's holding that TxDot complied with NEPA.

A Supplement Not Required When No New Federal Action

The district court properly found that the Bureau of Land Management (BLM) was not required to supplement its programmatic EIS for the Federal Coal Management Program because the federal action establishing the program was completed and only a new federal action would trigger a need to supplement the programmatic EIS. ***Western Org. of Res. Councils v. Zinke*, No. 15-5294, 892 F.3d 1234 (D.C. Cir. June 19, 2018).**

Background: In 1979, the BLM published a programmatic EIS for a Federal Coal Management Program and issued a Record of Decision (ROD) adopting the program later that year. The district court granted BLM's motion to dismiss because BLM had no duty to supplement the 1979 programmatic EIS because there was no remaining or ongoing federal action that conferred upon BLM a duty to do so. On appeal, plaintiffs argued that supplementation was required to analyze the climate impacts of the program. Specifically, plaintiffs claimed that numerous peer-reviewed scientific studies, which were not available to BLM when BLM issued its programmatic EIS, showed that coal combustion was the single greatest contributor to global warming and that this new information required BLM to update the environmental analysis, as circumstances changed. Plaintiffs argued that BLM could not rely on outdated analysis to support its program. Plaintiffs sought an order to compel BLM to update the program's programmatic EIS.

The Court's Analysis: While BLM did not contest that the analyses of climate impacts of coal leasing in the programmatic EIS was outdated, the agency did assert that it no longer had any NEPA obligation related to the program. Further, BLM stated that it was not proposing to take any new action in reliance on the 1979 programmatic EIS. The court agreed with BLM. Because there were no proposed amendments or revisions to the program, there remained no ongoing federal action that could require supplementation. Here, the action terminated with the program's approval, and there was no duty to supplement the EIS after that point. The court stated that it did not matter that the program continued to govern actions that took place after the approval. This did not render the original incomplete. Thus, the court held that BLM's NEPA obligation for the program terminated with its adoption in 1979.

Next, the court addressed the plaintiffs' claim regarding the scientific studies on climate impacts. The court stated that plaintiffs raised a compelling argument that BLM should now revisit the issue and adopt a new program or supplement its programmatic analysis. The court then went on to explain the avenues that plaintiffs may pursue to raise their claims regarding climate-change implications of coal leasing. Specifically, the court explained that plaintiffs may challenge specific licensing decisions on the ground that the EIS prepared in support of any decision failed to satisfy NEPA's mandate to consider cumulative impacts of coal leasing. The court then said that such a claim might challenge any attempt by BLM to rely on (or tier to) the 1979 programmatic EIS on the ground that it was too outdated to support new federal action when making individual leasing decisions. In a concurring opinion, Judge Henderson concurred in all but one part. She disagreed that the court should be advising parties on potential avenues of relief not before the court. After the court held that NEPA did not require a supplement EIS, the court need not and does not proceed further. She stated this followed the Supreme Court's direction and judicial restraint principles that courts follow.

FERC's EA for Relicensing a Power Generation Plant Violated NEPA

The court looked at whether FERC took a hard look at the environmental consequences of its action when it granted a license for a generation plan. It found that FERC failed to factor in the decades of environmental damage to the waterway from power generation and that damage's continuing ecological effects. ***Am. Rivers & Ala. Rivers Alliance v. FERC*, Nos. 16-1195 and 16-1336, 895 F.3d 32 (D.C. Cir. July 6, 2018).**

Background: FERC granted Alabama Power Company a 30-year license to continue power generation on a portion of the Coosa River. The action would cause a 100% take of multiple endangered mussels, a large loss of

indigenous fish, and cause low dissolved oxygen levels for substantial periods of time. FERC prepared an EA and finding of no significant impact (FONSI), concluding that licensing the generation plant would have no substantial impact on either the river's ecological condition or endangered species. The biological opinion concluded that relicensing the project was not likely to jeopardize any threatened or listed species, nor destroy or deleteriously affect any critical habitats. Plaintiffs challenged that the relicensing required an EIS because of the significant environmental effects on the vulnerable Coosa River ecological system.

The Court's Analysis: The court looked at whether FERC took a hard look at the environmental consequences of its decision. After reviewing the administrative record, the court found that the record did not provide a rational connection between the licensing decision, the record evidence, and the FONSI. The court determined that the analysis in the EA was "rife with flaws" and was unreasoned and unsupported by substantial evidence. For instance, the analysis on fish deaths was more than a decade old and FERC took this data from Alabama Power without any interrogation or verification of those numbers or studies. Basically, the court stated that it could not "evaluate the reasonableness of the unexplained." *Id.* at 41. Further, given the importance of maintaining the minimum dissolved oxygen levels to the aquatic system, the administrative record showed that it was devoid of evidence or data or mitigation measures as to aeration. Lastly, since the Fish and Wildlife Service's biological opinion was found not to comply with the Endangered Species Act because it failed to properly analyze the relevant environmental baseline or effects of the action, this "fatally infected" the cumulative impact analysis. Here, the court determined that FERC gave scant attention to those past actions that had led to and were perpetuating the Coosa River's heavily damaged and fragile ecosystem. FERC also did not provide any substantive analysis of how the present impacts of those past actions would combine and interact with the added impacts of the 30-year licensing decision. In conclusion, the court held that FERC's EA was "arbitrary and capricious, insufficiently reasoned, and unsupported by substantial evidence." *Id.* at 52. The court vacated the licensing decision.

Agency Appropriately Applied Its Categorical Exclusion

The court looked at whether an extraordinary circumstance for noise applied that prevented the Federal Aviation Administration (FAA) from using its categorical exclusion. FAA's extraordinary circumstances regarding noise precludes it from applying a categorical exclusion when an action has the potential for a significant impact on noise levels of noise sensitive areas. ***Brram, Inc. v. FAA*, No. 16-4355, 721 Fed Appx. 173, 2018 WL 332908 (3rd Cir. Jan. 9, 2018) (not for publication).**

Background: Allegiant requested that the FAA amend its Operating Specifications to allow it to operate at Trenton, a commercial airport located in New Jersey. Allegiant planned to conduct fourteen operations (seven takeoffs and seven landings) at Trenton per week. It submitted a noise impact analysis on its proposed operations that concluded that its operations would not have a significant impact on noise levels in the area. FAA approved Allegiant's requested amendment. In its categorical determination, FAA considered the noise analysis prepared by Allegiant, along with a noise analysis prepared by Trenton that was based on a forecast twenty years into the future of all foreseeable air traffic by Allegiant and other airlines operating at Trenton. Both noise analyses showed that Allegiant's operation at Trenton would not have a significant impact on noise in the area.

Plaintiffs argued that extraordinary circumstances regarding noise precluded a determination that a categorical exclusion was applicable. However, plaintiffs did not challenge the validity of the noise analyses. They also did not argue that the noise analyses were based on improper assumptions about future air traffic or that FAA's conclusions were erroneous. Instead, plaintiffs argued that FAA was required to consider the impacts of Allegiant's expansion beyond the fourteen operations proposed because FAA, once it permits an airline to operate at an airport, it cannot control the number of flights the airline will operate.

The Court's Analysis: Here, FAA determined that no extraordinary circumstances applied. FAA then concluded that its categorical exclusion for Allegiant's operating specifications and amendments did not significantly change the operating environment of the airport. After reviewing the administrative record, the court agreed. The court determined that plaintiffs' assertions that FAA only considered fourteen proposed operations in conducting its noise analysis was incorrect. FAA not only looked at the noise impacts from Allegiant, it also looked at the foreseeable air traffic of all the airlines operating at Trenton for the next twenty-years. Thus, the court held that FAA did not act arbitrarily and capriciously in concluding no extraordinary circumstance applied. The court affirmed FAA's decision.

Agency Reasonably Assessed Project's Impacts to the Steelhead

The court looked at whether the U.S. Army Corps of Engineers' (USACE) reasonably assessed a development project's potential impacts on the Southern California steelhead, an endangered species, that had habitat in the Santa Clara River. *Friends of the Santa Clara River v. United States Army Corps of Eng'rs*, No. 15-56337, 887 F.3d 906 (9th Cir. Apr. 9, 2018).

Background: Plaintiffs argued that USACE's decision to issue a permit under Section 404 of the Clean Water Act to a company that proposed a large-scale residential, commercial, and industrial development near Santa Clarita, California, did not comply with NEPA. Specifically, plaintiffs claimed that the project's stormwater and wastewater discharges would affect the Southern California steelhead in the Santa Clara River due to dissolved copper concentrations.

The Court's Analysis: The court disagreed. On reviewing the administrative records, the court determined that USACE reasonably determined that the project was not likely to affect steelhead populations in the Santa Clara River. Here, the data and analysis set forth in the EIS established that concentrations of dissolved copper in discharges from the project would be within the background range already observed and well below the criterion for the Santa Clara River. The additional stormwater retention measures required by USACE would reduce the dissolved-copper concentration even further below background levels. Given this information, the court concluded that USACE reasonably determined that the project's discharges of dissolved copper would not affect steelhead downstream. The court held that USACE did not act arbitrary or capricious when it concluded that the project would not result in significant cumulative water quality impacts to steelhead.

Pipelines Had Independent Utility

The court reviewed whether FERC's segmented pipeline projects had independent utility. *Township of Bordentown v. FERC*, Nos. 17-1047 and 17-3207, 903 F.3d 234 (3rd Cir. Sept. 5, 2018).

Background: Transcontinental Pipe Line Company, LLC, sought an expansion of its interstate natural gas pipelines facilities, known as the Garden State Expansion Project, so that the pipeline system could support another 180,000 dekatherms per day of capacity for natural gas from its Mainline to its Trenton-Woodbury Lateral. FERC conducted an EA, concluding that, with the appropriate mitigation measures, the project would have no significant impact on the environment. Plaintiffs claimed that the PennEast project, an interstate pipeline that would deliver natural gas from the Pennsylvania's Marcellus Shale region and terminate at an interconnect with Transcontinental's Mainline, and the Southern Reliability Link (SRL) project, a 28-mile-long intrastate pipeline that would connect to Transcontinental's Trenton-Woodbury Lateral pipeline, were connected actions that must be considered together with the Garden State Expansion Project. Plaintiffs argued that FERC improperly considered the Garden State Expansion project separately from the impacts of the PennEast and SRL projects. In addition, plaintiffs challenged FERC's determination that the project would not significantly impact the potable wells in the project's vicinity.

The Court's Analysis: The court first looked at the segmentation of the PennEast project. Plaintiffs argued that PennEast was a connected action that must be considered together with the Garden State project because the two projects lacked independent utility. To support their claim, plaintiffs relied on the fact that the Garden State project would supply capacity to the New Jersey Natural Gas (NJNG) company from the PennEast line. However, the court found this to be incorrect. While the Garden State project would supply capacity to NJNG, the source of the physical support for the capacity by the project was not the PennEast line but from the Zone 6 pooling point, and that the source of the pool's gas would be determined based on market conditions. Further, the PennEast served many shippers apart from NJNG. Thus, the court determined that the PennEast and Garden State projects would go forward even if one was not built. The Garden State project existed to fulfill NJNG's need for gas in southern New Jersey, a need that existed and required satisfaction whether or not PennEast was constructed.

Next, the court looked at whether the SRL project was improperly segmented. Here, FERC lacked jurisdiction over the SRL, an intrastate project, to warrant an environmental analysis. The SRL project also fell outside the Garden State project's area of influence. FERC nonetheless considered the SRL project in its cumulative impact analysis. FERC ultimately determined that the SRL project's cumulative impact was insignificant. The court stated that by detailing and recognizing the environmental impacts outside the zone impacted by the jurisdictional project, FERC gave plaintiffs' concerns the serious consideration and reasonable responses that NEPA required. The court concluded that FERC adequately addressed the project's cumulative impacts.

Lastly, the court looked at whether the project's construction would not significantly impact the water quality of wells or cisterns in the service area. Here, FERC determined in its EA that groundwater effects were expected to have minor, temporary impacts. After FERC learned of the existence of private wells in the project area, FERC imposed mitigation measures, along with a reporting framework to ensure compliance. Thus, the court found FERC adequately considered the potential impact to the wells, responded appropriately to the concern, and reasonably concluded that with mitigation, any impact would be insignificant. Here, plaintiffs did not contend that FERC underestimated how the construction would impact a well in the project area, but only that FEC had not confirmed how many wells the project may disturb. Therefore, FERC, even without knowing the precise number of wells potentially impacted, could reasonably conclude that the intensity would be insignificant, especially when accounting for the mandatory mitigation imposed in the certificate. The court held that FERC's treatment of the well impacts did not run afoul of NEPA.

Tiering to a Draft EIS Did Not Violate NEPA

The court looked at whether the Forest Service violated NEPA by improperly incorporating the analysis of prior agency documents that did not undergo a full NEPA review. *Alliance for the Wild Rockies v. United States Forest Service*, No. 16-35829, 907 F.3d 1105 (9th Cir. Oct. 25, 2018).

Background: The Forest Service's 2003 Payette National Forest Land and Resource Management Plan governs management decisions on all land within the Payette National Forest. The Plan divided the forest into management areas. Land within each management area was assigned to various categories, called management prescription categories, that determined how the land was managed. In 2011, the Forest Service proposed amendments to the 2003 Forest Plan. The proposed amendments, called the wildlife conservation strategy (WCS) amendments, would prioritize activities that would help maintain or restore habitat for certain species of wildlife that the Forest Service determined were in greatest need of conservation. The Forest Service prepared a draft EIS. However, the Forest Service stopped the NEPA process and the amendments were never adopted. In 2014, the Forest Service approved the Lost Creek Project, which proposed landscape restoration activities on approximately 80,000 acres of the Payette National Forest. Plaintiff alleged that the Forest Service violated NEPA when it finalized the Lost Creek Project. Specifically, plaintiff argued that the Forest Service violated NEPA by

improperly incorporating, or tiering to, the WCS amendments that had not undergone a full NEPA review and were improperly relied upon to justify deviations from the policies set forth in the 2003 Forest Plan.

The Court's Analysis: The court noted that the WCS amendments themselves are an agency policy statement, not a NEPA document, and tiering to this document would be improper under CEQ's regulations. Similarly, tiering to the draft EIS on the WCS amendments would also be improper because this document did not undergo public comment and was therefore, not subject to the full NEPA review. Nevertheless, the court did not find that Forest Service's reliance on the WCS draft EIS to be improper. Here, portions of the EIS for the Lost Creek Project showed that Forest Service relied on data and science prepared for the WCS draft EIS. The court stated this might be considered improper tiering, but for the fact that the Lost Creek EIS goes on to analyze the desired conditions for the management prescription categories and the wildlife habitat categories from the WCS amendments in the context of the present project. Further, plaintiff did not identify any required analysis that was not performed in the Lost Creek EIS. Thus, the court found that the Forest Service appropriately incorporated the standards and science underlying the WCS amendments. It held that Forest Service did not violate NEPA by improperly tiering to the WCS amendments or the WCS draft EIS.

Forest Service Failed to Conduct an Independent Review of an EIS Before Adopting It

The court found that the Forest Service violated NEPA when it adopted a sedimentation analysis in an EIS because it did not articulate a rational connection between the facts found and the choice it made to amend its Forest Land Resource Management Plan to accommodate a right-of-way for the construction and operation of a pipeline. ***Sierra Club v. United States Forest Service*, Nos. 17-2399, 18-1012, 18-1019, and 18-1036, 897 F.3d 582 (4th Cir. July 27, 2018).**

Background: Plaintiff challenged Forest Service's decision to amend the Jefferson National Forest Land Resource Management Plan to accommodate the right of way and pipeline construction proposed by Mountain Valley Pipeline, LLC. Forest Service served as a cooperating agency on FERC's EIS for the pipeline project and adopted FERC's EIS. Plaintiff argued that Forest Service violated NEPA by adopting FERC's EIS and relying upon the EIS's analysis of erosion and sedimentation effects in the Jefferson National Forest. Specifically, plaintiff argued that the EIS failed to take the required hard look at impacts within Jefferson National Forest. Here, Forest Service worked with FERC on the Hydrologic Report, but it had serious concerns on the second draft of this report, stating that the report overestimated the containment of sediment. Responding to Forest Service's concerns, Mountain Valley Pipeline submitted a third and final Hydrologic Report. However, when FERC published its EIS, it incorporated and relied upon the second draft of the Hydrologic Report. When Forest Service issued its ROD, adopting FERC's EIS, it relied upon the third and final Hydrologic Report. However, Forest Service did not provide any discussion as to how its concerns with regard to the second draft had been alleviated, and it did not explain how the EIS was an adequate statement even though it relied on the second draft and not the third.

The Court's Analysis: An agency may adopt an EIS only if it undertakes an independent review of the EIS and concludes that its comments and suggestions have been satisfied. Here, the court could not find any evidence that Forest Service undertook the required independent review of the EIS's sedimentation analysis. Nor could the court ascertain how the Forest Service concluded that its comments had been satisfied, especially after it expressed such grave concerns about the sedimentation analysis presented in the second draft of the Hydrologic Report. Here, leading up to the filing of the EIS, Forest Service continued to express steadfast concerns about the figures proposed in the second draft of the Hydrologic Report. There was also no indication that FERC considered the third draft of the Hydrologic Report at all, yet Forest Service adopted the EIS anyway. Therefore, it was unclear to the court whether and how Forest Service's concerns were alleviated. Here, the ROD contained no statement explaining how Forest Service's earlier concerns were alleviated. Thus, the court concluded that Forest Service acted arbitrarily and capriciously in adopting the sedimentation analysis in the EIS.

Agency's Requirement of Showing of Irreparable Harm Violated NEPA

The Nuclear Regulatory Commission (NRC) requirement that a tribe must show irreparable harm for a survey of cultural, religious, and historical sites could be completed violated NEPA's action-forcing purpose. *Oglala Sioux Tribe v. United States NRC*, No. 17-1059, 896 F.3d 520 (D.C. Cir. July 20, 2018).

Background: Powertech, Inc. applied to NRC for a license to construct a uranium mining project in the Black Hills of South Dakota, known as the Dewey-Burdock project. The Oglala Sioux Tribe, which has historical ties to the project area, feared the destruction of its cultural, historical, and religious sites. The tribe claimed that the EIS violated NEPA because it failed to adequately address the environmental effects of the Dewey-Burdock project on Native American cultural, religious, and historical resources. NRC agreed that the EIS did not adequately catalogue the cultural, historical, and religious sites of the Tribe and did not include mitigation measures sufficient to protect the Tribe's cultural, historical, and religious sites that may be affected by the Project. NRC found that NEPA's hard look requirement had not been satisfied. However, NRC left Powertech's license in effect while it attempted to resolve the deficiencies in its NEPA review.

The Court's Analysis: A core requirement of NEPA is that an agency decision-maker must consider an adequate environmental review before making a decision on a proposed action. The court stated that if NRC allowed its staff to supplement and cure an inadequate NEPA document after the agency had already made a licensing decision, then this fundamental purpose of NEPA was frustrated. Here, NRC argued that the Tribe was not entitled to relief unless it demonstrated harm. However, the court stated that nothing in NEPA's text suggested that the required environmental analysis of a proposed action was optional if a party did not prove irreparable harm would result from going forward before the agency completed a valid EIS. Therefore, NRC's reliance on irreparable injury was erroneous and contrary to NEPA. Here, the Tribe was concerned that mining, as well as construction and other land disturbances that precede mining, would damage those resources. The purpose of an EIS was, in part, to determine whether that land contained such resources and where they were located, so that damage to them could be avoided or mitigated. If the project was permitted to go forward without the necessary land survey, such damage may well be done. NRC's position was to allow the project to go forward and if the burial or other sites were damaged, the Tribe would then be able to show irreparable harm, but it would be too late to stop it. The point of NEPA was to require an adequate EIS before a project goes forward, so that construction does not begin without knowledge of the affected cultural and historical sites. This was part of the harm that NEPA attempted to prevent in requiring an EIS. Therefore, the court held that once NRC determined that there was a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm. However, the court did not decide on whether NRC may leave in place a license that its staff previously issued but that NRC later found to be NEPA deficient. The court explained that it was not deciding if there was no version of a harmless error rule that NRC may apply, nor was the court deciding if there were no protective conditions NRC might impose that would justify leaving a license in place during an administrative remand intended to cure a NEPA deficiency.

A Categorical Exclusion for a Highway Renovation Project Was Properly Applied

The Federal Highway Administration (FHWA) appropriately applied its categorical exclusion to a highway renovation project. *Highway J Citizens Group v. United States DOT*, No. 17-1036, 891 F.3d 697 (7th Cir. June 5, 2018).

Background: Wisconsin proposed to renovate a 7.5 mile stretch of Highway 164. The proposed renovation entailed repaving, reconstruction near hill crests where drivers could not see approaching traffic, widening lanes, improving sight lines, updating guardrails, adding rumble strips, and introducing turn or bypass lanes at some intersections. FHWA approved Wisconsin's environmental report, finding that a categorical exclusion applied.

Plaintiffs argued that FHWA was required to conduct its own separate analysis and that the report was required to analyze the cumulative effects of multiple highway renovation projects.

The Court's Analysis: FHWA's NEPA procedures allows it to issue a categorical exclusion when FHWA determines that renovating existing roads would not individually or cumulatively have a significant effect on the human environment. Here, the court concluded that the report showed that the renovation would not have significant environmental effects. Under its categorical decision, FHWA's only action was to decide whether the project would have significant environmental impacts. Its use of a categorical exclusion did not require FHWA to conduct a separate report. Here, FHWA was active in preparing the report, commenting on drafts and making suggestions. Only when the process was complete to FHWA's satisfaction, did FHWA sign off. The court stated that no statute or rule required more. Here, plaintiffs did not contest FHWA's categorical decision or its finding that the road renovations cumulatively did not amount to major federal actions with significant environmental effects. Thus, an agency need not analyze cumulative effects when the categorical exclusion itself considered them.

Reasonable Range of Alternatives Was Examined for Motorized Vehicle Use in National Forest

The Forest Service examined a reasonable range of alternatives when it designated limited, additional authorized motorized trails. *Granat v. United States Dep't of Agriculture*, No. 17-15665, 720 Fed. Appx. 879, 2018 WL 1979212 (9th Cir. June 11, 2018) (not for publication).

Background: The Department of Agriculture's 2005 Travel Management Rule overhauled off-road vehicle management across the country's national forest. It required the Forest Service to designate certain roads and trails in each forest as open for motorized vehicle use and prohibit such use outside of these designated areas. In implementing this rule, the Forest Service developed a proposal for limited, additional designations of motorized trails in the Plumas National Forest. It identified 1,107 miles of "user-created" routes where motor vehicle use had occurred over time without agency authorization. In its EIS and ROD, the Forest Service designated 234 miles of user-created routes as open for motorized travel. Plaintiffs claimed that Forest Service violated NEPA by failing to consider a reasonable range of alternatives.

The Court's Analysis: The court found that Forest Service engaged with the public to develop four action alternatives that were consistent with the project's purpose and need. These four alternatives examined a reasonable range of user-created routes for designation. Here, plaintiffs failed to show that considering additional alternatives was necessary to permit the Forest Service to make a reasoned choice. Thus, the court held that Forest Service considered a reasonable range of alternatives.

Wind Project Was Not a Major Federal Action

Bonneville Power Administration's (BPA) appropriately considered that a wind project was not a major federal project to trigger a NEPA review. *Friends of the Columbia Gorge v. Bonneville Power Admin.*, No. 15-72788, 716 Fed. Appx. 681, 2018 WL 1476609 (9th Cir. March 27, 2018) (not for publication).

Background: Plaintiffs requested a review of BPA's record of decision granting Whistling Ridge Energy's wind project an interconnection to BPA's transmission system. BPA determined that the wind project was not a major federal action under NEPA and only considered the interconnection itself in its NEPA analysis.

The Court's Analysis: In evaluating whether the wind project was a major federal action, the court looked at whether the project received federal funding, whether the federal government exercised control over the planning and development of the project, whether the environmental effects of the state action were ignored or were

considered as one of the secondary effects of the federal action, or whether the wind project and interconnection were dependent or served distinct functions. A review of the administrative record, showed that the wind project was not a federal action. Here, the wind project received no federal money and the federal government exercised no control over the planning or development. BPA also engaged in a joint NEPA analysis with the state regulatory agency. Lastly, the court determined even if interconnection with BPA was the only feasible means of transmitting power generated from the wind project, the interconnection and the wind project served complementary but distinct functions. Here, BPA would merely transmit power generated by a private wind project to other private consumers along its existing transmission system. Thus, the court could not conclude that BPA's non-federal-action determination was arbitrary, capricious, or contrary to law.

An Airport's Tree Trimming Project Not Federalized

A tree trimming/removal project was not federalized because federal officials could not influence the program. ***Kaufmann v. FAA*, No. 17-3152, 722 Fed. Appx. 438, 2018 WL 497529 (6th Cir. Jan. 22, 2018) (not for publication).**

Background: The FAA determined that trees on privately owned property near Bowman Field's runways made nighttime landings dangerous when Instrument Flight Rules (IFR) were in effect. In response, the Louisville Regional Airport Authority (LRAA) sought to trim and remove trees under the Safety Program for Bowman Field. The Safety Program aimed to promote airport safety by trimming and removing trees penetrating into Bowman Field airspace. The LRAA would obtain avigation easement from neighboring landowners, either through negotiation or through condemnation power. LRAA requested and received funds from FAA to prepare planning documents. However, due to delays in FAA's environmental review process, LRAA proceeded to implement the Safety Program using state funds. Notwithstanding LRAA's decision to forego federal funding, FAA finalized its ROD, finding that the Safety Program would have no significant environmental impact. Here, FAA found that the project would affect only 104 of the roughly 3,600 trees in the area, and that, for every tree removed, LRAA would plant two smaller trees in its place. The ROD did not approve federal funding for the Safety Program and it made clear that it did not constitute a federal funding commitment. It simply provided the environmental findings necessary for LRAA to seek federal funding in the future. Plaintiffs petitioned the court to review the ROD issued by FAA, seeking an order to set aside the ROD and to enjoin LRAA from trimming or removing trees.

The Court's Analysis: Although plaintiffs note that the Safety Program was a response to the FAA's ban on most nighttime IFR landings at Bowman Field, the court found this to be irrelevant. Here, LRAA had authority under state law to proceed with the Safety Program, and it was doing so without funding or direction from the FAA. Federal approval of the program was not required. Because federal officials could not influence the program, it was not federalized merely because the LRAA used federal funding in the planning stages. Where federal funds are used in a state project, NEPA would apply only if federal decision-makers retained power, authority, or control over the state project. Here, the court found that federal officials had no control over the Safety Program. Therefore, the court dismissed plaintiffs petition for review.

Future Mining Activity Too Speculative

A hypothetical future mining activity contemplated to the north of an existing mine was not currently a reasonably foreseeable future action and did not warrant analysis in an environmental assessment. ***Northern Plains Res. Council, Inc. v. United States BLM*, No. 16-35447, 725 Fed. Appx. 527, 2018 WL 1060564 (9th Cir. Feb. 27, 2018) (not for publication).**

Background: Plaintiff challenged BLM's decision to lease coal in Montana's Bull Mountains to Signal Peak Energy, LLC. Specifically, plaintiff alleged that: 1) BLM's cumulative impact analysis violated NEPA by failing to address reasonably foreseeable mining for a mine located to the north of the existing mine area; 2) BLM improperly tiered its analysis; 3) BLM failed to take a hard look at the mining impacts upon the topography and water resources; and 4) BLM improperly relied on mitigation measures to minimize the impacts on surface and water resources.

The Court's Analysis: The court rejected plaintiff's arguments. First, the court determined that BLM reasonably determined that the hypothetical future mining activity to the north was not currently a reasonable foreseeable future action. Here, the future mining activity was remote and highly speculative, therefore the court stated it did not warrant analysis in the EA. The court explained that since the scope, magnitude, and time frame for the future mining in the north had not been proposed or outlined, a cumulative effects analysis would be both speculative and premature.

Second, the court determined that BLM did not improperly tier its analysis to a 1990 EIS. Here, BLM referenced analysis from its 1990 EIS to supplement and facilitate its analysis of the environmental effects of continued mining associated with its leasing decision. The court stated that an agency may tier from an EIS on a specific action at an early stage to a subsequent analysis at a later stage. Here, plaintiff failed to point to any evidence, other than age, that suggested the unreliability of the 1990 data.

Third, the court disagreed that the EA failed to take the requisite hard look at the mining impacts upon the topography and water resources. Here, the EA contained extensive discussion of the anticipated effects that further mining would have on the area's topography and water resources, including the ground and surface water quality, the hydrologic impacts of groundwater, and on area springs. Because BLM adequately considered the effects upon the affected topography and water resources, the court determined its decision was fully informed and well-considered.

Lastly, the court determined that BLM did not rely on any mitigation measures in its analysis to the extent that an EIS would be required. Here, BLM acknowledged the existence of some surface effects from subsidence, but it concluded that the overall surface effects from subsidence would be minor in the short-term and negligible in the long-term. BLM also noted that the current permit required Signal Peak to mitigate short and long-term hydrologic and wetland impacts. The court found this to be reasonable. In conclusion, the court held that the district court properly granted summary judgment to BLM.

Plaintiffs Forfeited Challenge by Not Raising Objections During the Comment Period

The court looked at what citizens must do during the administrative planning stage of a NEPA action in order to preserve a later challenge to an agency's final decision. *Little Traverse Lake Prop. Owners Ass'n v. Nat'l Park Serv.*, No. 17-1064, 883 F.3d 644 (6th Cir. Feb. 23, 2018).

Background: In 2008, the National Park Service (NPS) proposed a plan to build a scenic trailway through the Sleeping Bear Dunes National Lakeshore in Leelanau County, Michigan. One of the alternative routes considered for the trailway ran along Traverse Road. Residents along this road opposed having visitors going down their residential street and submitted their objections during the public comment period. In 2009, in response to their objections to the 2008 proposal, NPS revised its proposal by making significant changes to the portion of the trail that ran along Traverse Road. The residents did not submit any objections to the revised 2009 trail plan. NPS approved the route along Traverse Road in its FONSI. Six years later, plaintiffs, comprised of residents and others, challenged the adequacy and accuracy of NPS's environmental analysis and its decision not to issue an EIS for a trail plan.

The Court's Analysis: Here, plaintiffs failed to raise any objections to the revised 2009 trail plan during the public comment period. While plaintiffs raised their concerns to the 2008 trail plan, NPS addressed these concerns by making significant changes to the trailway in the revised 2009 trail plan. However, plaintiffs did not renew their concerns or make it clear to NPS that the revised 2009 trail plan did not resolve their concerns. The court found that plaintiffs' claims were forfeited because plaintiffs failed to participate in NPS's planning process in a manner that would have alerted NPS to their objections to the 2009 plan, and therefore, plaintiffs did not allow NPS the opportunity to give the issues meaningful consideration before issuing its final decision.

An EA for a Proposed Shooting Range Took a Hard Look on Noise Impacts

The court reviewed whether the Forest Service took a hard look at the effect of a proposed shooting range on the existing noise levels. *McGuinness v. United States Forest Serv.*, No. 16-2406, 741 Fed. Appx. 915, 2018 WL 3599996 (4th Cir. July 26, 2018) (not for publication).

Background: After eleven years of environmental study, the Forest Service approved the development of three to five acres of the Nantahala National Forest in Clay County, North Carolina, for a shooting range. In its EA, the Forest Service considered the environmental effects from the potential noise from gunfire and conducted noise studies on private residences and trails near the site. Plaintiffs alleged that Forest Service violated NEPA by failing to prepare an EIS due to significant noise impacts and failing to consider a reasonable range of alternatives.

The Court's Analysis: Here, the EA described the existing noise levels and provided a detailed description of the additional noise that would result from the proposed alternatives on locational sites for the shooting range. The EA also described the management actions to contain and reduce noise emanating from the shooting range as needed. The court determined that Forest Service's consideration of alternatives, including the no action alternative, was more than sufficient to satisfy the NEPA requirements that it took a hard look at the effect of its actions on the existing noise levels. The court also determined that an EIS was not necessary. A review of the administrative record showed that Forest Service carefully considered the noise effects of its decision, noting that the shooting range would create additional low-level noise for residents in the vicinity and for hikers on the nearby trails, and any increased noise levels would be approximate to loud conversational speech. Looking at the ten factors for significance, Forest Service concluded that the noise would not be highly controversial and that the effects were not uncertain or involve unique or unknown risk. The court agreed with Forest Service and deferred to Forest Service's analysis. Based on the record, the court determined that Forest Service considered the relevant factors, examined the relevant data, and provided an explanation of its decision that included a rationale connection between the facts found and the choice made. While plaintiffs countered that opposition to the project showed controversy, the court stated that mere opposition to a proposed action did not make the action highly controversial. In conclusion, the court found that Forest Service's FONSI was not arbitrary or capricious.

No NEPA Foul in Issuing License Before NEPA Was Completed

The court reviewed whether the Nuclear Regulatory Commission (NRC) post-license supplementation violated NEPA. *NRDC v. United States NRC*, No. 16-1298, 879 F.3d 1202 (D.C. Cir. Jan. 19, 2018).

Background: NRC allowed supplementation of a final EIS for a uranium mining project located in Crook County, Wyoming, after the license for the project had been issued. NRC determined that supplementation was required after an administrative hearing found that the final EIS did not include enough information concerning post-mining aquifer restoration. The analysis in the supplemental EIS looked at the potential environmental effects of restoration of groundwater in the mined aquifer. Plaintiff argued that issuing the license before the final EIS was completed violated NEPA.

The Court's Analysis: The court determined that plaintiff failed to point to any harmful consequence of the supplementation and the court found that there was nothing to be gained by remanding the matter to NRC to consider the same information again. Here, NRC adequately augmented its decision before being challenged in court, and it did so in a publicly accessible opinion. The court stated that what NRC did was not ideal or even desirable and it would have been preferable for the final EIS to contain all relevant information and the ROD to be complete and adequate before the license was issued. However, the court said that while NRC's procedure was not ideal, it was permissible. The court was not left to rely on post hoc rationalizations because it had NRC's supplemental assessment, embodied in an opinion composed after due investigation and before the matter was brought to court. The court found that there was no harm and no foul under NEPA, and hence there was no point in remanding the matter to NRC.

Agency Took a Hard Look at the Impacts of a Casino Project

The court rejected plaintiff's NEPA challenges that the Bureau of Indian Affairs (BIA) failed to take a hard look at the environmental impacts of a proposed casino project. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Zinke*, Nos. 17-15245 and 17-15533, 889 F.3d 584 (9th Cir. May 2, 2018).

Background: The BIA conducted an environmental analysis on whether to take a parcel of land into trust for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria so that the tribe could build a casino and hotel complex. The BIA retained a consultant, Analytical Environmental Services (AES), to assist in the preparation of the EIS and other related NEPA documents. The tribe paid for AES's fees. Plaintiff alleged that the EIS's purpose and need statement was unduly restrictive and that the EIS contained numerous data flaws. Plaintiff also argued that BIA failed to provide oversight of the EIS.

The Court's Analysis: While agencies enjoy considerable discretion to define the purpose and need, it cannot define its objectives in unreasonably narrow terms. Here, the court determined that the purpose and need was not artificially limited. The EIS described BIA's intent to provide the tribe with a vehicle for substantial economic development and self-sufficiency. BIA also considered five possible alternatives to achieve the purpose and need: a hotel casino; a small casino; a water park; a casino at another site; and no action. The court stated that this range of alternatives were not illusory.

Next, the court looked at whether the EIS contained insufficient data. First, plaintiff argued that the biological data was stale. However, a review of the administrative record showed otherwise. Plaintiff did not explain why the data was unreliable and pointed to no authority or provided no argument why the data was suspect. Second, plaintiff argued that the economic data was flawed. However, plaintiff's alleged missing economic data was connected to its claim that it will experience economic harm as a result of the casino project. The court dismissed this argument since purely economic interests do not fall within NEPA's zone of interests. Third, plaintiff argued that the air quality was deficient under NEPA. However, plaintiff failed to explain how the proposed emissions may violate the Clean Air Act, NEPA or any other statute. The court found that plaintiff waived this argument by failing to develop it. Fourth, plaintiff argued that the EIS ignored the potential harm to six fish species of concern. However, plaintiff failed to offer any evidence that there was an actual danger to these species of fish and failed to describe how the casino project would likely affect the fish. Here, the EIS stated that the fish species would not live in or near the project site and plaintiff did not provide any evidence or argument to undermine the EIS's statement.

Lastly, plaintiff argued that BIA failed to exercise independent oversight of AES. However, plaintiff failed to present evidence that BIA did not make an independent choice to contract with AES. Plaintiff pointed to nothing in the Third-Party Agreement or to anything else in the record that called into question that BIA's representation.

Plaintiff did not show an impermissible conflict of interest and failed to show that AES had a financial stake in the project. For these reasons, the court affirmed the summary judgement of the district court.

Forest Service Took a Hard Look at a Project to Reduce Wildfires

The Forest Service's misstatements about populations trends for goshawks and pine martens species was not a significant factor in its approval of a forest thinning project to reduce the threat of wildfire. *Native Ecosystems Council v. Marten*, No. 16-35571, 883 F.3d 783 (9th Cir. Feb. 22, 2018).

Background: Plaintiff challenged Forest Service's proposed Lonesome Wood Vegetation Management 2 Project, designed to reduce the threat of wildfire in a populated area of the Gallatin National Forest in Montana. The project would entail thinning over 2,500 acres of forest land, including 495 acres of old growth forest. Plaintiff alleged that the EIS contained misleading or inaccurate information and was therefore deficient.

The Court's Analysis: First, plaintiff argued that the EIS provided an incomplete and misleading description of a peer-reviewed article on Goshawk nesting areas. The court disagreed and found that the Forest Service did not act arbitrarily or capriciously in how it described and analyzed the article. Here, Forest Service explained that the article analyzed goshawks in a national forest that had significantly different characteristics from the Gallatin National Forest. Second, plaintiff argued that the EIS misrepresented the contents of an unpublished report on the moose population. However, the court found that Forest Service's response to be reasonable when it explained that both the report and Forest Service had reached the same conclusion that the moose population was stable. Third, plaintiff claimed that the EIS misstated that the goshawk and pine marten populations were stable to increasing. The court agreed that this statement was inaccurate. However, it found that this mistake was not a significant factor in the Forest Service's approval of the Lonesome Wood project. Here, while data indicated slightly declining populations on a statewide basis, the Forest Service determined that the project would not affect forest-wide population trends of both species. The court also determined that this mistake did not prevent the public from making an informed decision about the likely effects of the project. The court clarified that it was not underestimating the importance of accurate descriptions, but that in the context of this particular project, Forest Service's mistake was not inconsistent with its having taken a hard look at the project.

Agency Took a Hard Look at Impacts to Wetlands from a Pipeline Project

The court reviewed whether the USACE appropriately issued a FONSI for a pipeline project that would impact wetlands. *Basinkeeper v. United States Army Corps of Eng'rs*, No. 18-30257, 894 F.3d 692 (5th Cir. July 6, 2018).

Background: Bayou Bridge proposed to build a 162-mile crude oil pipeline from Lake Charles, Louisiana to terminals near St. James. Portions of the pipeline would cross the Atchafalaya Basin, affecting wetlands. The USACE authored two EAs, one under the Rivers and Harbors Act and the other under Section 404 of the Clean Water Act and issued a FONSI on both EAs. Plaintiffs claimed that the EAs violated NEPA by failing to adequately analyze mitigation for the loss of cypress-tupelo swamp along the pipeline right of way through the basin and by failing to adequately consider the historical noncompliance by other pipelines and the cumulative effects of spoil banks left from past projects.

The Court's Analysis: In reviewing the record, the court first looked at whether the USACE adequately analyzed mitigation for the loss of cypress-tupelo swamp. Here, it found that the USACE conducted a careful research, following its regulations and the scientifically based Louisiana Wetland Rapid Assessment Method (LRAM) tool. The USACE conditioned the permit in accordance with evolved best management practices and required the purchases of acreage within mitigation banks that would provide the optimal replacement of lost aquatic functions

and services. Thus, the court found that the record supplied a rational connection between the facts about the project, its impacts and the decision rendered. The court held that USACE's decision was not arbitrary and capricious.

Next, the court looked at the cumulative impacts. The court determined that the plaintiffs have misread the EAs. Here, the EAs concluded that because of the appropriate mitigation measures, such as the construction conditions and limitations in the permit, and the purchase of compensatory mitigation bank acreage, there would be no incremental impact. Thus, there would be no cumulative effects with regard to pre-existing spoil banks. The court stated that "a finding of no incremental impact relieved an agency of the necessity of extensive and ultimately uninformative discussion of cumulative effects." *Id.* at 704. The court also determined that plaintiffs' concern about the cumulative effects based on the alleged past noncompliance with USACE's permit conditions was misplaced. Here, examples provided by the plaintiffs either were projects that predated the Clean Water Act or were based on misinformation. Thus, the court held that USACE's treatment of cumulative impacts was not deficient, or arbitrary and capricious.

Agency Provided Thorough Explanation of Why Alternatives Were Not Reasonable

The USACE's decision not to further analyze three alternatives for a water reallocation project was not arbitrary or capricious. *Audubon Soc'y of Greater Denver v. United States Army Corps of Eng'rs*, No. 18-1004, 908 F.3d 593 (10th Cir. Nov. 5, 2018).

Background: The USACE issued its ROD, approving the Chatfield Storage Reallocation Project that would allow certain water providers in the Denver metropolitan area to store 20,600 acre-feet of water in the Chatfield Reservoir. The effect of this project would raise the maximum water level by 12 feet, flooding 587 acres of Chatfield State Park. Plaintiff challenged that USACE's EIS on this project did not adequately address a reasonable range of alternatives. Plaintiff argued that USACE dismissed three alternatives without sufficient explanation. Specifically, plaintiff claimed that USACE: 1) failed to examine enhanced water conservation measures that went beyond the standard methods already being used by water providers; 2) erred when it excluded upstream gravel pits from further consideration; and 3) failed to consider purchasing storage capacity at the Rueter-Hess Reservoir instead of expanding the Chatfield Reservoir.

The Court's Analysis: The USACE initially examined thirty-eight alternatives for securing additional water supply for the Denver metropolitan area. USACE dismissed thirty-four of these alternatives. Among those alternatives dismissed by USACE were increased water conservation, development of gravel pit storage upstream from Chatfield Reservoir; and the purchase of water storage capacity at the Rueter-Hess Reservoir. After explaining its decision not to further analyze these alternatives, USACE considered the remaining four alternatives in detail. After reviewing the administrative record, the court found that USACE's decision not to further analyze the three alternatives was not arbitrary or capricious. Here, USACE considered increased water conservation at length and concluded that it was not practicable alternative because of shortages of sustainable water supplies would not be resolved by water conservation measures alone. USACE also explained why upstream gravel pits did not merit further discussion due to limited storage capacity and logistical difficulties of combining reservoirs to meet storage requirements. Plaintiff countered that a preliminary report showed that the pit could have the capacity for 11,000 acre-feet of storage when expanded. However, the court said that this new information did not render USACE's decision arbitrary or capricious because the information was not provided to USACE until after the final EIS was issued. Lastly, USACE explained in detail why storing water at the Rueter-Hess Reservoir was not a viable alternative because there was no available storage in that reservoir. In conclusion, the court determined that USACE sufficiently explained why these alternatives were not worthy of further analysis, which was all that NEPA required.

When Adopting an EIS Agency Failed to Conduct an Independent Review

The court looked at whether the Forest Service complied with NEPA in issuing a Special Use Permit and ROD authorizing Atlantic Coast Pipeline, LLC, to construct the Atlantic Coast Pipeline through parts of the George Washington and Monongahela National Forests and granting a right of way across the Appalachian National Scenic Trail. *Cowpasture River Pres. Ass'n v. Forest Service*, No. 18-1144, 911 F.3d 150 (4th Cir. Dec. 13, 2018).

Background: The Atlantic Coast Pipeline project would traverse 604.5 miles and would stretch from West Virginia to North Carolina. It would cross 21 miles of national forest land. Construction would involve clearing trees and other vegetation from a 125-foot right of way, trench digging to bury the pipeline, and blasting and flattening ridgelines in mountainous terrains. Following construction, the project would require maintaining a 50-foot right of way for the life of the pipeline. FERC was the lead agency on the EIS, and the Forest Service served as a cooperating agency by assisting FERC in the analysis of the environmental impacts to 430 acres of national forest lands on the proposed pipeline route. Forest Service adopted FERC's EIS. Plaintiffs argued that the Forest Service violated NEPA by failing to consider alternatives that avoided national forest lands and by adopting an EIS that failed to take a hard look at landslide risks, erosion, and degradation of water quality.

The Court's Analysis: An agency may only adopt an EIS if it meets the standards for an adequate statement. An agency must undertake an independent review of the EIS to ensure that its comments and suggestions to the lead agency were satisfied before adopting it. Here, the administrative record demonstrated that Forest Service failed to undertake the required independent review. The record showed that Forest Service strenuously objected to the lack of non-national forest route alternatives in the EIS. It then reversed course without explanation and adopted the EIS, even though the analysis in the EIS did not consider non-national forest routes. The court stated that there was no evidence in the record that showed that FERC addressed Forest Service's concerns about off-forest alternative routes. Therefore, given the circumstances, the court could not conclude that Forest Service undertook an independent review and determined that its comments and concerns were satisfied. The court held that adopting the unchanged alternative analysis in the final EIS was arbitrary and capricious.

In addition, the court concluded that Forest Service violated NEPA by failing to take a hard look at the environmental consequences of the pipeline project. Here, Forest Service expressed serious concerns about the lack of information to evaluate landslide risks, erosion impacts, and degradation to water quality and that the EIS lacked information about the effectiveness of mitigation techniques to reduce those risks. The EIS did not address any of these concerns and made clear that this type of analysis remained incomplete. Nonetheless, Forest Service relied on the incomplete analysis in the EIS and disregarded its concerns about the effectiveness of the mitigation techniques. Forest Service provided no explanation for its reversal on its position and there was no evidence in the record that showed that Forest Service concerns were ever resolved. The court stated to satisfy NEPA, Forest Service needed to resolve its own concerns with the EIS and needed to have a reasonable basis for concluding that the mitigation plan, once fully formed, would be effective. Here, the court determined that Forest Service made an uninformed decision and acted arbitrarily and capriciously in adopting the EIS.

Original Approval of a Plan of Operation Was the Major Federal Action Under NEPA

A mineral report that established that a company had valid existing rights to mine apart from the withdrawal was not a major federal action. The recommencement of mining activities was also not a major federal action. The major federal action occurred at the time the agency approved the original mining plan of operation. *Havasupai Tribe v. Provencio*, Nos. 15-15754 and 15-15857, 906 F.3d 1155 (9th Cir. Oct. 25, 2018).

Background: In a prior holding, the Ninth Circuit upheld the 2012 decision of the Secretary of the Interior to withdraw, for twenty years, more than one million acres of public lands around Grand Canyon National Park from

new mining claims. *National Mining Association v. Zinke*, 877 F.3d 845 (9th Cir. 2017). However, the withdrawal did not extinguish valid existing rights. In Forest Service's 2012 Mineral Report with findings, the Forest Service concluded that Energy Fuels had a valid existing right at the time of the withdrawal to mine within the withdrawal area. Here, Energy Fuels owned the Canyon Mine, a 17.4-acre uranium mine in the area around Red Butte, a site of religious and cultural significance to the Havasupai Tribe. In 1988, the Forest Service approved the plan to build and operate the Canyon Mine. Forest Service prepared an EIS on its 1988 decision. In 1992, the mine was placed on stand-by status due to the unfavorable conditions in the uranium market. In 2012, a few months before the Secretary's withdrawal decision became final, Energy Fuels notified the Forest Service that it intended to return the mine to active operations. The Forest Service reviewed its 1998 decision, including its EIS and the mine's approved plan of operations, for any changes that might require additional federal actions to be taken before operations resumed. The Forest Service concluded that the plan of operations was still in effect and no amendment or modification was required before the Canyon Mine resumed operation. The Forest Service also concluded that no new federal action subject to further NEPA analysis was required for the resumption of operations. The Tribe claimed that Forest Service's 2012 determination that Energy Fuels had a valid existing right to operate the Canyon Mine was a major federal action that required the Forest Service to prepare an EIS in connection with its determination.

The Court's Analysis: The court disagreed that the Mineral Report was a major federal action under NEPA. The court stated that in prior cases, it held where a proposed federal action would not change the status quo, an EIS was not necessary.⁴ The court also held that an EIS was not necessary to discuss the environmental effects of mere continued operation of a facility.⁵ The court also determined that there were no regulations that required approval of a new plan of operations before regular mining activities may recommence following a temporary closure.⁶ The court further held that the original approval of the plan was the major federal action and that action was completed when the plan was approved.⁷ In following the holding in *Center for Biological Diversity*, the court held that the original approval of the plan of operations was the major federal action and that action was completed in 1988 when the plan was approved. The resumed operation of the Canyon Mine did not require any additional federal action. Therefore, the EIS prepared in 1988 satisfied NEPA.

Removal of Gray Wolves Was Not a Major Federal Action

The court looked at whether federal participation transformed a state project into a major federal action that required NEPA compliance. *Wildlands v. United States Dep't of Agric.*, No. 17-35508, 2018 WL 5980575 (9th Cir. Nov. 14, 2018) (not for publication).

Background: The U.S. Department of Agriculture's Animal and Plant Health Inspection Services - Wildlife Services assists the State of Oregon in its removal of gray wolves. It also financially contributed to the Oregon Wolf Conservation and Management Plan and assisted in the Plan's operation. Plaintiff claimed that Wildlife Services' participation was a major federal action that required the preparation of a NEPA-required analysis.

The Court's Analysis: To make a determination of when federal participation may transform a state or local project into a major federal action, the court considered the degree to which the given action was funded by the federal agency and the extent of the federal agency's involvement and control in the action. The court stated that marginal federal action would not render an otherwise local action federal. Here, the court found that Wildlife Service's financial contribution to the Oregon Wolf Conservation and Management Plan and its control over the Plan's operation was not sufficient to render its involvement a major federal action. Here, Wildlife Services

⁴ *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990).

⁵ *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980).

⁶ *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013).

⁷ *Id.* at 1093.

contributed only a marginal level of federal funding to the Plan, and the court in past actions had been unwilling to impose NEPA requirements when federal funding fell below ten percent of a state project's total costs. The court also determined that Wildlife Services lacked power to control the Oregon Wolf Plan. Here, the Plan is a state-run program covered by state administrative rules and led by the Oregon Department of Fish and Wildlife (ODFW). The ODFW has the sole discretion to determine when a wolf should be killed under its rules and where and when to remove problem wolves. The court determined that the ODFW would continue to kill gray wolves even if Wildlife Services was not involved. This suggested to the court that Wildlife Service's involvement did not control the Plan's outcomes. Here, Wildlife Services' discretionary authority was whether to accept or reject ODFW's request to remove a specific problem wolf. However, the court stated that this choice was limited by the conditions set by ODFW and the Plan. While Wildlife Services was able to determine the method to use for the removal, it had to consult with ODFW to make this determination and it had to select one of the methods permitted by ODFW and the Plan. Wildlife Services also lacked regulatory authority to implement other approaches or to require alternative actions of ODFW. Based on these findings, the court held that Wildlife Service's participation in the Oregon Wolf Plan was not a major federal action and that NEPA did not apply.

Agency Took a Hard Look at Noise, Air Emissions and Cumulative Impacts for Air Traffic Redesign

The court reviewed whether the FAA properly found its project to modernize the federal airspace had no significant impacts. *Vaughn v. FAA*, Nos. 16-1377, 16-1378, 17-1010, and 17-1029, 2018 WL 6430368 (D.C. Cir. Nov. 30, 2018) (not for publication).

Background: To improve the operational efficiency of air traffic, the FAA redesigned air-traffic control procedures and flight patterns at several airports in Southern California. Plaintiffs claimed that the redesigned flight routes led to increased noise in certain neighborhoods. Plaintiffs objected to FAA's finding of no significant impacts. Specifically, plaintiffs claimed that FAA failed to analyze for noise, air emissions, and cumulative environmental effects.

The Court's Analysis: The court found that FAA's environmental analysis was substantively reasonable and procedurally sound. The court first looked at the noise effects. Here, plaintiffs argued that FAA must reduce noise rather than simply avoid any significant increase in noise. However, the court determined that FAA sufficiently considered reducing noise levels. For example, FAA described several ways in which it modified the project to address the community concerns about noise. Therefore, the court rejected plaintiffs challenge. Next, plaintiffs objected to FAA's use of an outdated computer program called NIRS to analyze noise levels. Instead, plaintiffs claimed that FAA should have used a newer software program, called AEDT, that FAA was mandated to use for projects started after March 1, 2012. FAA countered that its noise analysis using NIRS began before the March 2012 cut-off date and it was not required to switch to the new software in March 2012. The court deferred to FAA's explanation that it found to be reasonable. Plaintiffs also argued that FAA's choice of a metric to measure noise was incorrect and FAA should have used Cumulative Noise Equivalency Level (CNEL), which weights more heavily noise occurring in the evening hours. Here, FAA used the Day-Night Sound Level (DNL). FAA explained that it accepts CNEL when a state requires that metric to assess noise effects. However, this project did not involve any state environmental review and thus, FAA said it was not required to use CNEL. The court again deferred to FAA's reasonable explanation.

Plaintiffs also failed to show that the project would have a significant effect on air emissions and on the climate. The court determined that FAA properly found a minimal effect on air emission and climate because most procedures would occur at or above 3,000 feet. The court also found that FAA appropriately concluded that addressing congestion and improving safety overcame a negligible fuel burn increase and thus, FAA's de minimis standard was proper. The court also stated that the California standards to reduce greenhouse gas emissions to certain levels by 2020 were not part of California's state implementation plan and thus, it did not apply.

Next, plaintiffs argued that FAA was required to conduct a cumulative analysis for noise and air quality. The court disagreed. Since FAA reasonably found no significant effect, the court saw no reason for an agency to conduct a cumulative impact analysis for a particular environmental resource after the agency reasonably concluded its proposed action would not have a significant effect on that resource. Plaintiffs argued that FAA failed to account for the Los Angeles International Airport project proposed in 2025 that involved moving and extending runways. However, FAA explained that this project was not reasonably foreseeable to account for in its cumulative air quality analysis. The court found FAA's explanation to be reasonable.

Lastly, the court rejected plaintiffs' argument that FAA failed to look at a reasonable range of alternatives. Here, FAA considered the proposed action and the no-action alternatives. The FAA evaluated various groups of procedures in different combinations to determine what alternative actions to present in its EA. The court found this satisfied FAA's duty to consider appropriate alternatives. In conclusion, the court found that plaintiffs failed to show that FAA's conclusions were arbitrary and capricious.

Socioeconomic Effects Alone Fall Outside of NEPA's Intended Range

Relying solely on socioeconomic effects was insufficient to trigger NEPA's EIS requirement. *Comanche Nation of Okla. v. Zinke*, No. 17-6247, 2018 WL 6601858 (10th Cir. Dec. 14, 2018) (not for publication).

Background: In 2014, the Chickasaw Nation submitted an application requesting the Department of the Interior to take approximately thirty acres into trust for the tribe so that it may operate a casino. The BIA issued an EA and FONSI on the trust acquisition. The plaintiff argued that BIA failed to take a hard look at the impacts of the casino project.

The Court's Analysis: Plaintiff argued that BIA's NEPA analysis was flawed because it failed to consider the economic impacts the new casino would have on the Comanche Nation's existing casino. However, the court stated that it is well settled law that socioeconomic impacts, standing alone, do not constitute significant environmental impacts cognizable under NEPA. Plaintiff also argued that BIA failed to consult with the Comanche Nation, citing to 40 CFR 1501.2(d) that states that agencies should consult with appropriate state and local agencies and Indian tribes. The court stated that the use of the term "appropriate" suggested an agency possesses discretion in determining which bodies to consult. Additionally, the court determined that the plaintiff was again solely relying on socioeconomic effects of the new casino and that was not enough to show it was necessarily an appropriate consulting tribe in this case.

Significant New Circumstances Required Supplementation

New analysis on deer habitat capabilities that altered the results of its original environmental analysis required the Forest Service to supplement its NEPA document. *Greenpeace, Inc. v. Stewart*, No. 17-35945, 743 Fed. Appx. 878, 2018 WL 6200531 (9th Cir. Nov. 28, 2018) (not for publication).

Background: Plaintiff challenged Forest Service's authorization of four timber sale projects in the Tongass National Forest. Plaintiff argued that Forest Service was required to supplement its NEPA analysis due to new circumstances in deer carrying capacities.

The Court's Analysis: The court agreed with the plaintiff. Here, Forest Service's reanalysis of the timber projects revealed that deer carrying capacities would dip below the recommended viability minimums and this new circumstance was relevant to the environmental concerns of the proposed action. The court stated that this new information altered the results in Forest Service's environmental analysis. While the court recognized that this case has been in litigation for over a decade, the court stated that Forest Service had failed to correct flaws in its

project analysis and had ignored the court's guidance. It remanded to the district court with instructions to enforce and vacated Forest Service's approval of the four timber sale projects.

Agency Took a Hard Look at the Impacts of Two Post-Fire Logging Projects

The court reviewed whether the Forest Service's decision to forego an EIS was arbitrary and capricious. *Wildlife Def. v. Seesholtz*, No. 18-35400, 2018 WL 6262505 (9th Cir. Nov. 29, 2018) (not for publication).

Background: Plaintiffs sought to enjoin the operation of two post-fire logging projects in the Boise National Forest. It claimed that the Forest Service was required to prepare an EIS instead of an EA.

The Court's Analysis: The court disagreed. Here, the record showed that the projects would not significantly affect the environment. The court determined that Forest Service considered both the context and intensity of its proposed actions. For example, in evaluating the context, the Forest Service considered the impacts on the project areas, in addition to the total area affected by the fire. The Forest Service also considered the cumulative impacts for added sediment contribution to streams from the use of roads during the salvage operations. The court also stated that it was permissible for the Forest Service to aggregate the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed actions was measured. In conclusion, the court found that plaintiffs failed to establish that Forest Service's FONSI for these projects, considered in the overall context of the fire area and in light of mitigation measures used, was arbitrary and capricious.

Agency Took a Hard Look at the Impacts for a Highway Construction Project

The court reviewed whether the FHWA's selection of an alternative was arbitrary and capricious. *Paradise Ridge Def. Coalition v. Hartman*, No. 17-35848, 2018 WL 6434787 (9th Cir. Dec. 7, 2018) (not for publication).

Background: Plaintiffs claimed that FHWA violated NEPA in selecting an alternative for construction of a new segment of Highway US-95 south of Moscow, Idaho.

The Court's Analysis: The court found that FHWA took a hard look that NEPA required. The court found that it was reasonable for FHWA to rely on the Highway Safety Manual for predicting the relative safety of each alternative route. Here, plaintiff failed to argue that FHWA should have used an alternative methodology. Next, the court found that FHWA did not make an irreversible and irretrievable commitment of resources before completing its NEPA analysis. Thus, FHWA did not impermissibly predetermine the outcome of the NEPA analysis. FHWA also did not err in considering one route from each geographic corridor, because the routes within each geographic corridor had substantially similar consequences. The court stated that NEPA did not require a separate analysis of alternatives which are not significantly distinguishable from alternatives considered or which have substantially similar consequences. In addition, the court determined that FHWA discussed the mitigation measures for invasive weeds in sufficient detail to ensure that environmental consequences had been fairly evaluated. In conclusion, the court found that FHWA's selection of its alternative was supported by the record and was not arbitrary, capricious, or an abuse of discretion.

Agency Took a Hard Look at the Impacts for a Runway Airport Expansion

The court reviewed whether the FAA properly decided not to prepare an EIS. *Informing Citizens Against Runway Airport Expansions v. Federal Aviation Administration*, No. 17-71536, 2018 WL 6649605 (9th Cir. Dec. 18, 2018) (not for publication).

Background: Plaintiff sought review of FAA's decision to approve a project to construct a 5,200-foot runway at the Ravalli County Airport in Hamilton, Montana. Plaintiff argued that FAA was required to prepare an EIS and not an EA.

The Court's Analysis: The court denied the petition for review. It found that FAA's action was not arbitrary, capricious, or an abuse of discretion. It determined that FAA acted within its discretion and exercised its technical expertise in using fuel sales to estimate annual operations at the airport. Here, FAA used data available in its 2014 EA, which explained that the forecasting report relied in part on fuel sales to estimate operations. The court said that FAA disclosed the hard data supporting its expert opinion as NEPA required. The court also determined that FAA reasonably explained its conclusion it drew from its chosen methodology and its reasons it found the evidence to be reliable. Therefore, the court found that FAA provided sufficient information to permit the public to weigh in and to inform the agency decision-making process.

The court also found that FAA reasonably articulated the project's purpose and need for a 5,200-foot runway to safely accommodate larger aircraft. Thus, it found that FAA did not define the purpose and need in unreasonably narrow terms. In addition, FAA considered an appropriate range of alternatives that met FAA's mandate to promote safe and efficient air transportation. Since keeping the current runway was not a viable alternative, the FAA was not required to examine that alternative.

FAA also addressed the project's effect on property values sufficiently to comply with NEPA. For example, FAA examined several studies of aircraft noise on property values. Here, the preferred alternative showed that no residential properties would come within the 65 DNL contour, an area where the planes are the loudest. The court stated that plaintiff failed to show how FAA's failure to respond to any specific comment or study rendered its decision arbitrary.

Finally, the court found that FAA provided the public with a meaningful opportunity to participate in the decision-making process. Here, FAA comment period lasted for 73 days. In conclusion, the court found that FAA was not required to prepare an EIS.

Agency Took a Hard Look at Impacts of Upgrades to Pipelines

The court reviewed whether FERC's environmental effect analysis was inadequate and if an EIS was warranted. ***Town of Weymouth, Massachusetts v. Federal Energy Regulatory Commission*, Nos. 17-1135, 17-1139, 17-1176, 17-1220, 18-1039, 18-1042, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018) (not for publication).**

Background: Two natural gas pipeline companies, Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, LLC, proposed upgrades to their New England systems. The upgrades entailed replacing existing pipeline, modifying certain facilities, and building a new compressor system in Weymouth, Massachusetts. FERC prepared an EA. Plaintiffs petitioned for a review of FERC's EA. Specifically, plaintiffs claimed that the EA failed to consider the environmental effects from coal ash, noise, traffic, greenhouse-gas emissions, and impacts to environmental justice communities. Additionally, plaintiffs argued that FERC was required to prepare an EIS rather than an EA.

The Court's Analysis: The court disagreed with the plaintiffs. Here, FERC reviewed the companies' procedures for dealing with unexpected coal-ash contamination and ensured that construction would comply with relevant state environmental policies. FERC also considered noise impacts that would be emitted from the compressor station. As to traffic patterns, FERC reasonably concluded that construction staging areas would not significantly affect traffic. In addition, FERC both quantified the project's expected greenhouse-gas emissions and discussed how the project would impact with Massachusetts' climate-change goals. Lastly, FERC reasonably concluded that

the project would not disproportionately affect environmental justice communities around Weymouth because the compressor station effects would be similar to those experienced by non-environmental justice communities surrounding the three existing stations being expanded by the project. Here, the court stated the plaintiffs' evidence was insufficient to question FERC's analysis. Therefore, the court denied plaintiffs' petition for review.